



Order 2003-12-24

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the **29th day of December, 2003**

Application of

ARIZONA EXPRESS AIRLINES, INC.

for renewal of its commuter air carrier authority

Served: December 29, 2003

Docket OST-01-10529

ORDER RENEWING COMMUTER AIR CARRIER AUTHORITY

Summary

By this order, we renew the commuter air carrier authority of Arizona Express Airlines, Inc. (Arizona Express) for a period of one year.

Background

Section 41738 of the United States Code (“the statute”) and section 298.21(d) of the Department’s Aviation Economic Regulations (14 CFR 298.21(d)) direct us to determine whether companies proposing to provide scheduled passenger service as commuter air carriers are “fit, willing, and able to perform the service,” and to ensure that all operations relating to this service conform to the safety standards established by the Federal Aviation Administration (FAA). In making fitness findings, the Department uses a three-part test that reconciles the Airline Deregulation Act’s liberal entry policy with Congress’ concern for operational safety and consumer protection. The three areas of inquiry that must be addressed in order to determine a carrier’s fitness are whether the applicant: (1) will have the managerial skills and technical ability to conduct the proposed operations, (2) will have sufficient financial resources to commence the operations proposed without posing an undue risk to consumers or their funds, and (3) will comply with the Statute and regulations imposed by federal and state agencies. We must also determine that the applicant is a U.S. citizen.

By Order 2002-7-6, issued July 2, 2002, we found Arizona Express fit and granted it authority to engage in scheduled passenger operations as a commuter air carrier. However, we limited the carrier’s commuter authority to the use of aircraft that can be operated under Part 135 of the Federal Aviation Regulations (in effect, aircraft with no more than nine passenger seats), and limited the duration to a period of one year from the effective date of that authority. Arizona Express’ commuter authority became effective on August 19, 2002.¹ Thus, absent an

¹ See Order 2002-8-25, issued August 27, 2002.

extension, the carrier's commuter authority was slated to expire on August 19, 2003.² On July 23, 2003, Arizona Express filed an application in Docket OST-01-10529 requesting renewal of its commuter authority³ and provided updated fitness information in support of its request.⁴

We have received no objections to the renewal application. After reviewing the application, together with other information available to us, as discussed below, we have decided to grant the carrier a limited extension of its commuter authority.

FITNESS

The Carrier

Arizona Express registered with the Department in November 2001 as an air taxi under Part 298 of our rules and began providing such services in December 2001 after receiving the required operating authority from the FAA. Since being found fit and receiving effective commuter authority in August 2002, Arizona Express has been providing 14 weekly round trips between Phoenix and Show Low, Arizona.⁵ In April 2003, it began scheduled passenger service between Phoenix and Sierra Vista, Arizona, currently providing 11 weekly round trips in that market. At the present time, the carrier's fleet consists of two 9-seat Beech 1900's that it uses in its scheduled passenger services, plus a five-seat Cessna 525, and a six-seat Cessna 525A, which it uses to conduct on-demand charter services.⁶

Management

There has been no major change in the carrier's key management team since August 2002. At that time, the carrier's key managerial and technical personnel were as follows: Jeffrey Mark (Chairman and sole Director),⁷ Daniel Hall (President), Sean Kienle (General Manager), Randy Young (Director of Operations), M. Mitchell Ange (Chief Pilot), and Mark Swartwood (Director of Maintenance). Messrs. Mark, Hall, Kienle and Swartwood continue to hold their respective positions; Mr. Ange remains Chief Pilot, albeit for charter operations only. Michael Deluca joined Arizona Express as a pilot in June 2002, and in March 2003, became the company's Chief Pilot for scheduled operations. Previously, Mr. Deluca served as a

² The order required that any renewal application be filed at least 45 days prior to the expiration date of its authority (in this case, by July 5, 2003).

³ Since Arizona Express' application was filed in less than the 45 days required, the carrier accompanied its renewal application with a request that the Department waive the 45-day filing requirement. We will grant this request. In addition, by letter dated August 18, 2003, the Department extended Arizona Express' commuter authority until further Department action.

⁴ The applicant supplemented its application with additional fitness information, most recently on September 10, 2003.

⁵ Arizona Express was selected by the Department to provide subsidized essential air service at Show Low (see Order 2002-4-21, as extended by Order 2003-10-8).

⁶ The company conducts its charter services under the trade name "PhoenixJet".

⁷ Arizona Express is a wholly-owned subsidiary of J.L. Mark, Inc. Mr. Mark was, and remains, the sole shareholder of J.L. Mark, Inc.

Captain for Mesa Airlines (January 1996-May 2001) and First Officer for United Air Lines (May-October 2001).⁸ Mr. Deluca has 3,700 hours of flight time in Beech 1900 airplanes.

Randy Schares replaced Randy Young as Director of Operations in February 2003. Mr. Schares graduated from Embry-Riddle Aeronautical University in 1998 with a B.A. in Management of Technical Operations and Aviation Business Administration. He joined Native American Air Ambulance as a pilot in January 1999, where he also served as Chief Pilot, Check Airman, Flight Instructor and Base Manager (January 1999-November 2002).⁹

Both Mr. Schares and Mr. Deluca hold FAA-issued Airline Transport Pilot licenses and each has been approved by the FAA to hold his respective position.

Financial Position

Arizona Express provided an income statement for the 12-month period ending June 30, 2003, showing that, during this time, the company had a net loss of \$326,941 on operating revenues of \$939,579.¹⁰ Its June 30, 2003, balance sheet shows it to have current assets of \$68,262 and current liabilities of \$1.1 million for a negative working capital of approximately \$1 million and a current assets to current liabilities ratio of 0.06 to 1. It also reported negative retained earnings of \$587,534 and negative stockholders' equity of \$582,637. However, while the carrier's overall working capital deficit is considerable, we note that almost all of its current liabilities consist of loans from its owner. Excluding these particular obligations, the carrier's negative working capital is reduced to \$93,220 and its current assets to current liabilities ratio improves to 0.73 to 1.

Arizona Express will continue to receive subsidy payments for its essential air service at Show Low, at least until further notice.¹¹ Moreover, as noted above, much of Arizona Express' financial support thus far has come from its owner, Jeffrey Mark. Mr. Mark has reconfirmed his commitment to continue to provide the carrier with additional financial resources.

Compliance Disposition

It was because of concerns with the company's compliance disposition that we imposed a one-year limitation on the carrier's commuter authority. Specifically, as noted in Show Cause Order 2002-6-7, prior to receiving its commuter authority, Arizona Express published

⁸ Mr. Deluca was furloughed from United in 2001, at which time he took a position as a loan officer for American Home Loans (December 2001-June 2002).

⁹ His responsibilities included oversight of 26 pilots operating six aircraft. Previously, Mr. Schares had part ownership in Schogan Companies, Inc. (1985-1990), a general contracting firm.

¹⁰ Notwithstanding its generally unprofitable operations, we note that the losses from more recent operations appear to be less than those earlier in the period. Further, the company's revenues continue to climb steadily each quarter.

¹¹ The State of Arizona Department of Transportation (ADOT) is preparing a proposal that would allow the State to solicit, select, monitor, and pay a single carrier to provide essential service to four communities, including Show Low. In light of ADOT's proposal, the Department has deferred action on setting long-term subsidy rates for these communities. It is currently anticipated that Arizona Express will continue to service Show Low and receive a subsidy at least until a final decision in that case.

schedules reflecting a frequency of flights that exceeded those allowed under its then-air taxi authority.¹² Arizona Express and the Department's Office of Aviation Enforcement and Proceedings entered into a settlement of this matter in which, without admitting or denying the allegations, the carrier agreed to the imposition of a \$5,000 civil penalty. In addition, at the time, Daniel Hall, the carrier's President, had two civil actions pending against him.¹³ While we ultimately concluded that these issues did not warrant a negative fitness finding for the carrier, we nevertheless decided to limit its commuter authority to a period of one year, during which time we planned to monitor its compliance disposition before deciding whether to grant extended or permanent authority.

Arizona Express' compliance during the intervening year has not been without blemish. For instance, it conducted operations for about a year using the "PhoenixJet" trade name without actually registering this name as required under Parts 215 and 298 of our rules.¹⁴ Moreover, PhoenixJet, Inc., is a commonly-owned company that manages aircraft but holds no authority as an air carrier. It unlawfully held out and contracted for air transportation services in its own name that were operated by Arizona Express.¹⁵ Also, as noted earlier, the carrier failed to file its request for renewal of its commuter authority by the required date,¹⁶ and it has only recently begun to file the quarterly traffic and financial reports required of commuter carriers by Part 298.¹⁷ Finally, we note that in October 2003, the FAA imposed a \$10,000 civil penalty on Arizona Express.¹⁸

While none of the above issues, by itself, is indicative of a negative compliance posture, taken together, it is clear that Arizona Express has had some shortcomings in complying with the Department's rules. While not excusing such failings, on balance, we do not believe that the carrier's compliance posture is unacceptable at this time.

¹² Part 298 (14 CFR Part 298) allows an air taxi operator to provide scheduled passenger flights so long as such services do not exceed five round trips per week in any one market.

¹³ Mr. Hall advises that one of these cases has been dismissed by the court, and the other remains pending.

¹⁴ Part 215 (14 CFR Part 215) provides that a commuter air carrier may not hold out its services in any name other than that which its authority is issued unless it has first registered the trade name with the Department. Part 298 also requires a carrier to amend its commuter registration (OST Form 4507) to reflect certain changes in the company, including a change in the company's name or trade name. Although we understand that Arizona Express informed the FAA of its plans to use the "PhoenixJet" name in July 2002, and began using that name shortly thereafter, it did not amend its Part 298 commuter registration or otherwise register this trade name with the Department until July 2003 when we brought the matter to the carrier's attention.

¹⁵ After being contacted by the Department's Office of Aviation Enforcement Proceedings, Arizona Express corrected the situation and the matter was closed with a warning letter.

¹⁶ Arizona Express states that it failed to file a timely renewal application because ". . . in the course of researching service to other markets, it was forgotten." We note, however, that, by letter dated May 19, 2003, we reminded Arizona Express that its renewal application was due by July 5. Moreover, during the month of June, our staff had several conversations and other communications with Arizona Express regarding the proposed application.

¹⁷ These include the 298-C and T-100 reports commuter carriers must file with the Department's Bureau of Transportation Statistics (BTS) as required by Subpart F of Part 298.

¹⁸ According to the FAA, on June 28, 2002, an unauthorized individual improperly released an Arizona Express round trip charter flight between Phoenix and Springerville, Arizona, in violation of the carrier's FAA Operations Specifications; and, in violation of Part 135 of the Federal Aviation Regulations, the carrier did not report to the FAA that one of the engines on the aircraft shut down unintentionally.

For instance, notwithstanding its failure to properly register the “PhoenixJet” trade name with us, Arizona Express did advise the FAA that it was using the name. Thus, this does not appear to have been a deliberate attempt to hide its usage of the name from the Department, but rather a misunderstanding of the carrier’s obligation to register the name. Likewise, we are informed by BTS that, once reminded by the Department of its financial and traffic reporting obligations under Part 298, the carrier immediately filed the reports.¹⁹ We also note that the FAA violation cited above happened in conjunction with an on-demand air taxi flight well over a year ago (even pre-dating the carrier’s receipt of commuter authority), and we are unaware of any similar failure on Arizona Express’ part since then. Moreover, we note that Arizona Express has not been involved in any accidents or incidents since it began air taxi services in December 2001 and the FAA advises us that the carrier’s current operations are satisfactory and that that agency knows of no reason why we should not renew the carrier’s commuter authority. Finally, a review of the Department’s records indicates that Arizona Express has been providing its subsidized Phoenix-Show Low services in an overall reliable manner, and we are aware of no specific negative issues currently regarding the scheduled or charter services it is providing to the public.

Conclusion

On the basis of all of the above, we conclude that Arizona Express continues to be fit to hold its commuter authority.²⁰ However, in light of the compliance issues discussed above, we have decided to extend its authority only for a period of one year from the date of this order, during which time we will continue to monitor its compliance posture.²¹ At the conclusion of this period, and upon receipt from Arizona Express of an application for renewal of its authority (along with updated fitness information), we will re-evaluate whether to extend its commuter authority further. In addition, given that the carrier has provided no plans to operate aircraft having more than nine passenger seats, nor has it demonstrated its fitness to operate such aircraft, we will also continue our current condition restricting the company’s operations to aircraft operated under Part 135 of our rules.

ACCORDINGLY,

1. We extend the commuter air carrier authority currently held by Arizona Express Airlines, Inc., for a period of one year from the date of this order.

¹⁹ While it is ultimately the responsibility of each carrier to comply with this reporting requirement in a timely manner, we note that it is the Department’s practice to send each newly authorized commuter carrier information discussing its reporting responsibilities, including specific instructions on how to file the reports. Such notification was not provided to Arizona Express until September 8, 2003. We are informed by BTS that the carrier has since filed all past due reports with that office.

²⁰ We also conclude that Arizona Express remains a U.S. citizen. There has been no change in the carrier’s ownership over the past year. The company continues to be a wholly-owned subsidiary of J.L. Mark, Inc., an Arizona corporation which is, itself, owned by Jeffrey Mark, a U.S. citizen. In addition, all of the company’s key personnel are U.S. citizens and there is nothing in the record to suggest that control of the carrier rests with non-U.S. citizens.

²¹ We expect Arizona Express to be more diligent in its efforts to be aware of and fully comply with all of its regulatory responsibilities to the Department, including the FAA.

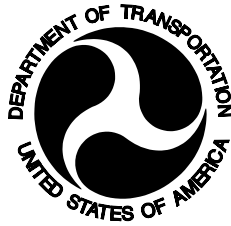
2. We reissue the Commuter Air Carrier Authorization issued to Arizona Express Airlines, Inc., by Order 2002-8-25 to reflect the new expiration date.²²
3. We grant the July 23, 2003, request of Arizona Express Airlines, Inc., for a waiver of the 45-day filing requirement imposed by Order 2002-7-6.
4. We direct Arizona Express to file any application for renewal with the Department at least 45 days prior to the one-year expiration date and to include with its application updated information on its ownership, key personnel, compliance history, operating plans, and financial position.
5. We will serve a copy of this order on the persons listed in Attachment A.

By:

KARAN K. BHATIA
Assistant Secretary
for Aviation and International Affairs

*An electronic version of this document is available on the World Wide Web at
<http://dms.dot.gov>*

²² The reissued authority also reflects the company's "PhoenixJet" trade name.



Commuter Air Carrier Authorization (as reissued)

ARIZONA EXPRESS AIRLINES, INC.
d/b/a PHOENIXJET

is authorized, subject to the provisions of Subtitle VII of Title 49 of the United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in scheduled passenger air transportation operations as a commuter air carrier.

This authorization is not transferable without the approval of the Department of Transportation.

By Direction of the
Secretary

Issued by Order 2003-12-24
On December 29, 2003
Aviation

Karan K. Bhatia
Assistant Secretary for

Effective on December 29, 2003 and International
Affairs



Terms, Conditions, and
Limitations

ARIZONA EXPRESS AIRLINES, INC.
d/b/a PhoenixJet

is authorized to engage in scheduled passenger air transportation operations as a commuter air carrier.

This authority is subject to the following provisions:

(1) The holder shall at all times conduct its operations in accordance with the requirements of 14 CFR Part 298 and any other regulations prescribed by the Department of Transportation for the services authorized here, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.

(2) The holder's authority is limited to operations conducted pursuant to Part 135 of the Federal Aviation Regulations.

(3) The holder's authority is effective only to the extent that such operations are also authorized by the Federal Aviation Administration (FAA), and comply with all Department of Transportation requirements concerning security.

(4) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).

(5) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render this authority ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this authority.

(6) The holder shall maintain in effect at all times with the Department of Transportation current information on OST Registration Form 4507.

(7) The holder may reduce or terminate service at any point or between any two points, subject to compliance with the provisions of 49 U.S.C. 41734 and all orders and regulations issued by the Department of Transportation under that section.

*This authority is being reissued to reflect its trade name and new expiration date.

(8) The holder may not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, except within the limits set forth in section 29 of the International Air Transportation Competition Act of 1979, as amended by section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998.

(9) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(l)), it must first comply with the requirements of 14 CFR 204.5.

(10) In the event that the holder commences but subsequently ceases all scheduled passenger operations, the authority granted here shall be suspended under the terms of 14 CFR 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume such operations within one year of its cessation, its commuter authority shall be revoked for dormancy.

(11) The authority contained herein shall expire on December 29, 2004.

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